Office - Supreme Court, U. S.
FILED
DEC 30 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 605

CHARLES G. GUTH, on his own behalf and on behalf and for the benefit of all other stockholders of PHOENIX SECURITIES CORPORATION, a corporation,

Petitioner,

against

WALLACE GROVES and W. W. COLPITTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

SYDNEY A. SYME,
THOMAS H. MATTERS, JR.,
DONALD HORNE,
Attorneys for Petitioner,
521 Fifth Avenue,
New York, N. Y.

THE SORG PRINTING CO., INC., NEW YORK, N. Y.

TABLE OF CONTENTS

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
Summary Statement of Matters Involved	1
Question Presented	2
Reasons Relied on for the Allowance of the Writ	3
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	4
Opinion Below	4
Jurisdiction	4
Statement and Summary of the Case	5
Specification of Errors	5
ARGUMENT	6
SINGLE POINT—THE COURT BELOW ERRED IN DISMISSING THE ACTION AGAINST RESPONDENTS FOR IMPROPER VENUE	6
I.—Who are the real parties to the stockholder's suit which petitioner brought against respondents in the United States District Court for the Southern District of New York?	7
II.—What is the residence of the parties to the action herein?	9
III.—Did the Phoenix Corporation, in whose behalf petitioner brought this action, have the right, under the 1936 amendment to Section 51 of the Judicial Code, to sue respondents in the United States District Court for the Southern District of New York? and, if so, whether that right inured to petitioner?	12
(a) State Law	12
(b) Federal Law	13
CONCLUSION	21

INDEX OF AUTHORITIES

Table of Cases Cited

	PAGE
Arn *v.* Bradshaw Oil & Gas Co., 93 F. (2) 728, C.C.A. 5	8
Arnold *v.* United States, 147 U. S. 494, 499	11
Baker *v.* Allen, 292 Mass. 169, 197 N. E. 521	8
Bank of Augusta *v.* Earle, 13 Pet. (U. S.) 519	9
Carron Iron Co. *v.* Maclaren, 5 H. L. Cas. 416, 10 Eng. Repr. 961	10
Comey *v.* United Surety Co., 217 N. Y. 268	10
De Beers Consolidated Mines, Ltd. *v.* Howe (1906), A. C. 455, H. L.	10, 19
Dehne *v.* Hillman Investment Co., 110 F. (2) 456, C.C.A. 3	10, 14
Dodge Mfg. Co. *v.* Patten, 60 F. (2) 676, C.C.A. 7	3, 8, 10, 16, 20
Eclipse Silk Mfg. Co. *v.* Hiller, 145 A. D. 568, 129 N.Y.S. 879	12
Edwards *v.* Bay State Gas Co., 91 Fed. 942	8
Ex parte Schollenberger, 96 U. S. 369	14
Gaunt *v.* Nemours Trading Corp., 194 A. D. 668, 186 N.Y.S. 92	10
Gerith Realty Corp. *v.* Normandie National Securities Corp., 154 Misc. 615, 276 N.Y.S. 655	8
Gramis *v.* Ordeau, 234 U. S. 385	20
Harr *v.* Pioneer Mechanical Corp., 65 F. (2) 332, C.C.A. 2, c. d., 290 U. S. 673	10
International Harvester Co. *v.* Kentucky, 234 U. S. 579	10
Koral *v.* Savory, Inc., 276 N. Y. 215, 11 N. E. (2) 883	8
La Compagnie Generale Transatlantique *v.* Thomas Law & Co. (1899), A. C. 431, H. L.	10
Matter of Newcomb, 192 N. Y. 238	19
Neirbo Co. *v.* Bethlehem Shipbuilding Corp., 308 U. S. 165	3, 9, 14, 16
Oklahoma Packing Co. *v.* Oklahoma Gas & Electric Co., 309 U. S. 4	3

PAGE

Overfield *v.* Pennroad Corp., 113 F. (2) 6, C.C.A. 3 ..... 3, 8, 14, 15, 18, 20
Owens *v.* Battenfield, 33 F. (2) 753, C.C.A. 8, *c. d.* 280 U. S. 605 20
Pennoyer *v.* Neff, 95 U. S. 714 20
Potter *v.* Walker, 293 N.Y.S. 161 8
Routenberg *v.* Schweitzer, 165 N. Y. 175 9
Schwarz *v.* Artcraft Silk Hosiery Mills, Inc., 110 F. (2) 465, C.C.A. 2 ..... 9, 14, 20
Sias *v.* Johnson, 86 F. (2) 776, C.C.A. 6 8
Tauza *v.* Susquehanna Coal Co., 220 N. Y. 259 10
Truax *v.* Corrigan, 257 U. S. 312 20
The German-American Coffee Co. *v.* Diehl, 216 N. Y. 57 9
Wait *v.* Kern River Mining, Milling & Developing Co., 157 Cal. 16, 106 Pac. 98 9
Wangrow *v.* Wangrow, 211 A. D. 552, 207 N.Y.S. 132 .. 8
Western Assur. Co. *v.* Mohlman Co., 83 Fed. 811, C.C.A. 2 11

Statutes Cited

Section 51 Judicial Code, Tit. 28 U. S. C., Sec. 112 ... 3, 6, 13
Art. 13, Sec. 210(1), New York General Corporation Law 12, 19
Art. 13, Sec. 223, New York General Corporation Law 12, 18
Art. 13, Sec. 224, New York General Corporation Law 13, 18
Art. 13, Sec. 225, New York General Corporation Law 13
Art. 25, Sec. 229-b, Civil Practice Act, New York .. 9, 13, 20

Miscellaneous

Mayers, Introduction to the Law of Business Corporations (1939) 20 9
Montevideo Treaty on International Civil Law (1940) 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No.....

CHARLES G. GUTH, on his own behalf and on behalf and for the benefit of all other stockholders of PHOENIX SECURITIES CORPORATION, a corporation,

Petitioner,

against

WALLACE GROVES and W. W. COLPITTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioner, CHARLES G. GUTH, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals entered in the above entitled cause on September 9, 1942.

Summary Statement of Matters Involved

The facts pertinent to the question presented are not disputed. The petitioner, a citizen and resident of the State of Maryland (R. 9), brought this stockholder's derivative suit for discovery and accounting, damages and an injunction, in the United States District Court for the Southern District of New York on behalf of Phoenix Securities Corporation, a Delaware corporation qualified

to do business in the State of New York (R. 9, 55), against said corporation and certain other defendants, among them the respondents herein, Groves, its president and chairman of the board of directors, and Colpitts, a director (R. 38, 39). The complaint charges respondents with frauds and acts of malfeasance, misfeasance and nonfeasance committed by them against said Phoenix Corporation and plaintiff and other stockholders, and prays for an injunction, restraining said individual defendants from disposing of or making away with assets which ought to be returned to said Phoenix Corporation by reason of their said fiduciary responsibility, and for the appointment of a receiver of the corporation (R. 8, 9). Groves claimed to be a resident of the State of Connecticut (R. 43), and Colpitts, of the State of New Jersey (R. 49). Summons with copy of the complaint was personally served on Groves at his apartment in the Waldorf-Astoria Hotel, New York, N. Y., and on Colpitts, at his office, 120 Wall Street, New York, N. Y. (R. 40). Each moved to dismiss the action against him for lack of venue (R. 41-50). The Phoenix Corporation has its office and place of business at 44 Wall Street, New York, N. Y. (R. 55). The jurisdiction of the District Court is based on diversity of citizenship. The District Court dismissed the action as against respondents for lack of venue (R. 3, 4), and the Circuit Court of Appeals affirmed without opinion (R. 59). On December 4, 1942, an order of Associate Justice Jackson extended petitioner's time to apply for certiorari to and including January 1, 1943 (R. 59). This petition is to review the decision and judgment of the Circuit Court of Appeals (R. 59).

Question Presented

Whether, in a stockholder's suit, brought in the district where the corporation has its office and principal place of business and within a State wherein the corporation is authorized to do business, although organized in another

State, venue may be acquired of defendants residing in other States, outside the district, by personal service of summons and complaint within the district?

Reasons Relied on for the Allowance of the Writ

1. The Circuit Court of Appeals has decided an important question of federal law under Section 51 (Tit. 28 U.S.C., Sec. 112) of the Judicial Code, which has not been, but should be, settled by this Court.

2. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Overfield* v. *Pennroad Corp.* (1940), 113 F. (2d) 6; and with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Dodge Mfg. Co.* v. *Patten* (1932), 60 F. (2d) 676.

3. The Circuit Court of Appeals has decided a federal question in a way probably in conflict with the decisions of this Court in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U.S. 165, and *Oklahoma Packing Co.* v. *Oklahoma Gas & Electric Co.*, 309 U.S. 4.

CONCLUSION

Petitioner is entitled to a write of certiorari addressed to the Circuit Court of Appeals for the Second Circuit to review and reverse the decision in this case.

Respectfully submitted,

SYDNEY A. SYME,
THOMAS H. MATTERS, JR.,
DONALD HORNE,
Attorneys for Petitioner,
521 Fifth Avenue,
New York, N. Y.